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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JONATHAN CURTIS, Defendant and Appellant.	C076045 (Super. Ct. Nos. 11F04056, 10F07217)

Defendant Jonathan Curtis pleaded no contest to receiving a stolen vehicle with a prior vehicle theft conviction (Pen. Code, §§ 496d, subd. (a), 666.5, subd. (a)),[1] three counts of unlawfully taking or driving a vehicle with a prior vehicle theft conviction (Veh. Code, § 10851; Pen. Code, § 666.5, subd. (a)), and grand theft (§ 487, subd. (a))

[1] Further undesignated statutory references are to the Penal Code.

and admitted a prior strike (§§ 667, subds. (b)-(i), 1170.12). He was sentenced to 13 years four months in state prison.[2]

On appeal, he first contends that he should be allowed to withdraw from his plea because it was "induced by a false promise of appealability" regarding his prior strike. He adds that his convictions for receiving and taking vehicles, as well as grand theft, should be reduced to misdemeanors pursuant to Proposition 47 (the Safe Neighborhoods and Schools Act). We reject these contentions and affirm.

BACKGROUND

We omit the facts of defendant's crimes as they are unnecessary to resolve this appeal. It suffices to say that defendant was initially charged in 2011, and later by information in 2012, with various charges including those to which he later pled no contest as detailed above.

Defendant successfully moved to represent himself on June 28, 2011. Counsel was appointed at his request on October 26, 2011. Following an unsuccessful motion to relieve counsel made pursuant to *People v. Marsden* (1970) 2 Cal.3d 118, defendant successfully moved to represent himself on April 5, 2012. The trial court initially denied defendant's request for appointed counsel on October 25, 2012, but then appointed counsel on November 5, 2012. The trial court denied a *Marsden* motion from defendant on April 10, 2013, but granted another *Marsden* motion on June 10, 2013. Defendant filed an April 5, 2013 motion to represent himself, but withdrew it five days later. He also filed *Marsden* motions on September 25 and November 19, 2013; the first was dropped and the second denied.

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[2] Defendant was also sentenced to a concurrent two-year term for receiving a stolen vehicle after his probation was terminated in case No. 10F7217. Since the primary focus of this opinion addresses the issue arising from his plea in case No. 11F04056, references to facts or proceedings are to those from that case unless otherwise noted.

Defendant filed numerous, lengthy, handwritten motions with the trial court during the case. Among these were four motions for disclosure made pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, a suppression motion, three discovery motions, three motions to dismiss the amended complaints, a motion to disqualify the prosecutor's office for bias and prejudice, a motion to suppress eyewitness identification, and a motion to strike the strike priors made pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. Appended to the People's opposition to defendant's April 5, 2013 motion to self-represent is a letter sent by defendant from jail to his wife in which he admits to filing frivolous motions "for the heck of it."

Defendant entered his no contest plea on November 20, 2013. The plea agreement included a 13-year four-month lid. Immediately before his plea, the trial court told defendant that he faced a potential sentence of 25 years if convicted on *all* charges. During the plea colloquy, the trial court told defendant the maximum potential sentence for conviction on the counts *to which he pled* was 15 years four months, but that pursuant to the plea agreement the maximum sentence he could receive after pleading was 13 years four months in prison. After the plea, sentencing was set for January 24, 2014.

On January 16, 2014, defendant filed a handwritten motion to withdraw his plea. As grounds for withdrawal, defendant asserted that trial counsel was ineffective for failing to review discovery, failing to properly advise defendant of his maximum exposure, and incorrectly advising him regarding the strike allegation.

A hearing on the motion to withdraw the plea was held on January 24, 2014, immediately before the previously scheduled sentencing hearing. Defendant told the trial court that he had sent "a slew of motions" and "a list of the witnesses" to trial counsel. Counsel told defendant that the witnesses probably were not necessary, but defendant maintained that "22 of them were absolutely necessary for my defense." He also claimed that various people had informed him that he faced "anywhere between 15 years and 125 years," and that after the plea, the trial court told him he was facing 15 years.

The trial court told defendant, "you were clearly informed by this Court what the maximum was that you were facing when you entered your pleas. So tell me what it is and why you believe legally you are entitled to withdraw your plea." Defendant replied that "aside from that, Your Honor, the only thing that I can cite at this point, because, again, there's a lot of this stuff that's legal issues and -- " at which point the court told defendant, "Well, you're not waiving any of those legal issues on appeal." Defendant then reiterated his concern regarding the maximum exposure and brought up "the legality of the prior strike." He believed "the strikes were invalid from the beginning."

Defense counsel replied that she had reviewed the discovery materials, including the over 5000 pages of documents "multiple times." Every time counsel talked with defendant, "the only issue that he ever wanted to address was the fact that he did not believe that he suffered a strike." Regarding the strike allegation, counsel told the court that defendant "simply has a strike. I provided him with certified documents. I've gone over that -- I've pointed out line by line how I -- how I'm relying on the fact that he has a strike." The trial court interjected, "[a]nd he does not waive that on appeal." Defense counsel replied, "That's correct. No, that is absolutely -- and I actually have informed him of that as well." She also informed the court that she had advised defendant of his 25-year maximum exposure "prior to coming into court."

Asked by the court to respond, defendant said, "You said something that I think I may have mis -- misunderstood. You said that I don't waive that on appeal. You're talking about the strike?" The trial court told defendant, "You absolutely have every right to bring that up on appeal, sir." Defendant thanked the court. The court then denied the motion to withdraw the plea and sentenced defendant to the lid of 13 years four months in prison.

DISCUSSION

I

Inducement of Defendant's Plea

Defendant claims that he should be allowed to withdraw his plea because his plea was *induced* by what he characterizes as trial counsel's false promise that he retained his right to contest the legality of his strike prior on appeal. He relies on the January 24, 2014 discussion with his counsel and the judge (which we have detailed above), held immediately before his sentencing but more than a month *after* his plea was entered, to argue inducement. He claims that because the assurances that he retained the right to challenge his strike on appeal are incorrect (in light of his admitting the strike allegation), neither trial counsel nor the court "could have properly advised [him] regarding the true benefit of his plea agreement," thus preventing him from waiving his rights in a knowing and intelligent manner and depriving him of the effective assistance of counsel.

Because the *entire basis* for defendant's claim of inducement occurred *post*-plea, and he presents no evidence of any inducement prior to his plea--only sheer speculation which is largely belied by the record--we are not persuaded.

"It is well settled that where ineffective assistance of counsel results in the defendant's decision to plead guilty, the defendant has suffered a constitutional violation giving rise to a claim for relief from the guilty plea." (*In re Alvernaz* (1992) 2 Cal.4th 924, 934.) Where, as here, a defendant contends that ineffective assistance of counsel induced his no contest plea, he or she must "establish not only incompetent performance by counsel, but also a reasonable probability that, but for counsel's incompetence, the defendant would not have pleaded guilty and would have insisted on proceeding to trial. [Citation.]" (*Ibid.*)

As we have noted, here the only evidence even arguably supporting defendant's claim are comments from defense counsel and the trial court made well *after* his plea. Defendant's response to those statements, "You said something that I think I may have

mis -- misunderstood. You said that I don't waive that on appeal. You're talking about the strike," is not consistent with his having this same understanding *before entering the plea*. Nor is the remainder of the record. Whether the strike itself could be challenged on appeal was not brought up at the plea colloquy. At that colloquy, defendant affirmed that he did not rely on any promises not detailed in court (such as appealability of his strike). While defendant maintained throughout the case that the prior was not a strike, he did not raise the appealability of this issue as a reason for withdrawing his plea. From the record before us, up until the hearing where the strike's appealability was (confusingly) raised by court and counsel, it appears defendant *understood* the validity of his admitted prior strike was no longer subject to appellate review given his plea. He claimed to have "misunderstood" when he first thought he heard that it was appealable, suggesting he knew it was not.

Even if we assume defendant's contentions regarding the strike were sincere and not one of the many admittedly frivolous claims he presented "for the heck of it," there is no evidence that he was induced to enter the plea based on a promise that he could challenge the validity of his strike after having admitted sustaining a strike conviction as part of his plea. Assuming that the statements of defendant's counsel and the trial court regarding the appealability of the admitted strike prior were incorrect, defendant has failed to carry his burden of establishing that he was induced to enter the plea based on erroneous advice from counsel.[3]

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[3] While the plea estopped defendant from contesting on appeal whether the prior was a strike (*People v. Ellis* (1987) 195 Cal.App.3d 334, 346-347), defendant's *Romero* motion, which trial counsel renewed at the sentencing hearing, could be raised on appeal notwithstanding the plea. (See *People v. Buttram* (2003) 30 Cal.4th 773, 785 [plea agreement does not bar consideration of *Romero* motion where the agreement set a maximum term but did not stipulate the sentence].)

II

Proposition 47

Defendant next contends that his convictions for receiving a stolen vehicle, unlawful driving or taking a vehicle, and grand theft in both cases should be reduced to misdemeanors pursuant to Proposition 47. Regarding the receiving and taking convictions, we note that whether Penal Code section 496d and Vehicle Code section 10851 are subject to Proposition 47 are questions currently before the California Supreme Court. (See, e.g., *People v. Johnston* (2016) 247 Cal.App.4th 252, review granted July 13, 2016, S235041; *People v. Nichols* (2016) 244 Cal.App.4th 681, review granted April 20, 2016, S233055.) However, as we explain, we need not reach that issue here, because defendant did not first move the trial court for Proposition 47 relief as to these counts of conviction, or as to his grand theft conviction, as far as the record shows.[4]

"On November 4, 2014, the voters enacted Proposition 47, the Safe Neighborhoods and Schools Act . . ., which went into effect the next day. (Cal. Const., art. II, § 10, subd. (a).)" (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) Proposition 47 enacted section 1170.18. (*Rivera*, at p. 1089.) Subdivision (a) of section 1170.18 provides that "[a] person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ('this act') had this act been in effect at the time of

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[4] We recognize that Proposition 47 was not yet in effect at the time of defendant's sentencing and filing of his notice of appeal. The retroactivity of Proposition 47 is an issue currently before our Supreme Court. (*People v. DeHoyos* (2015) 238 Cal.App.4th 363, review granted September 30, 2015, S228230.) As to the grand theft conviction, the People suggest in their briefing that defendant may have moved the trial court for Proposition 47 relief during the pendency of this appeal and note that the trial court lacked jurisdiction to grant relief. (See *People v. Scarbrough* (2015) 240 Cal.App.4th 916, 922). Defendant ignores this assertion in his reply brief. We agree that to the extent the trial court may have purported to reduce the grand theft conviction, or any count of defendant's *current* conviction, the action was without jurisdiction.

the offense *may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing* in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act." (Italics added.)

As this court has previously held, section 1170.18 provides the sole means by which a defendant can seek resentencing under Proposition 47 and it requires a motion to recall filed in the trial court. "Defendant is limited to the statutory remedy of petitioning for recall of sentence in the trial court once his [or her] judgment is final, pursuant to Penal Code section 1170.18." (*People v. Noyan* (2014) 232 Cal.App.4th 657, 672.) In a decision rendered after briefing in this case, our Supreme Court held that a defendant sentenced before the November 7, 2012 enactment of the Three Strikes Reform Act (Proposition 36), but whose judgment was not final until after that date, is not entitled to automatic resentencing but must instead petition for resentencing pursuant to section 1170.126. (*People v. Conley* (2016) 63 Cal.4th 646, 652.) Section 1170.18, is, to a certain extent, modeled after section 1170.126. (*People v. Esparza* (2015) 242 Cal.App.4th 726, 737; see also *People v. Scarbrough*, *supra*, 240 Cal.App.4th at p. 924 ["Sections 1170.18 and 1170.126 use substantially the same language, structure, and procedure to provide for recall and resentencing of persons currently serving sentences where those persons would be subject to lighter sentences pursuant to the newly enacted voter initiatives"].) Our Supreme Court's interpretation of this analogous procedure reinforces our conclusion that *Noyan* is correct. Since defendant did not first file a section 1170.18 petition in the trial court, we do not consider whether Proposition 47 applies to his convictions.

DISPOSITION

The judgment is affirmed.

/s/
Duarte, J.

We concur:

/s/
Raye, P. J.

/s/
Nicholson, J.